

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBBIE DREILING)	
Claimant)	
VS.)	
)	Docket No. 233,782
ROCK BOTTOM RESTAURANTS)	
Respondent)	
AND)	
)	
FIREMAN'S FUND INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant appeals Administrative Law Judge Julie A.N. Samples' February 8, 2002, Award. The Appeals Board heard oral argument on August 21, 2002.

APPEARANCES

Claimant appeared by and through her attorney, Terri Z. Austenfeld of Overland Park, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Steven J. Quinn of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award.

ISSUES

This is a claim for a low back injury claimant suffered while employed by respondent. As a result of the injury, on May 19, 1997, claimant underwent surgical intervention to repair herniated discs at L4-5 and L5-S1 by neurosurgeon Robert T. Tenny, M.D. In August 2000, claimant was diagnosed with a much greater recurrent disc herniation at L5-S1 on the right as well as a broad based disc protrusion on the left. On January 3, 2001, orthopedic surgeon Richard J. Feldman, M.D. performed a two level decompression, a discectomy at L5-S1 and fused with pedicle screws from L4 to the sacrum. The ALJ limited claimant's permanent partial general disability award to 17.5 percent based on claimant's permanent functional impairment. The Administrative Law

Judge (ALJ) found claimant failed to make a good faith effort to retain employment because she did not attempt to return to work for the respondent but chose to voluntarily quit and move to the state of California.

Claimant contends she is entitled to a higher work disability award because after her first surgery she was physically unable to perform her pre-injury job. Thereafter, claimant argues she made a good faith effort to find appropriate employment. But the employment claimant found paid less than 90 percent of her pre-injury average weekly wage, therefore, entitling her to a work disability.¹ Claimant argues she proved she sustained a 61 percent wage loss and a 65 percent work loss entitling her to a 63 percent work disability. Furthermore, claimant argues she proved a pre-injury average weekly wage of \$879.17 instead of \$725.33 as found by the ALJ.

In contrast, respondent requests the Board to affirm the 17.5 percent permanent partial general disability award. Respondent contends claimant was released by her treating physician, Dr. Tenny, to return to light duty work for four weeks and then to regular duty on August 4, 1997. Respondent argues, if claimant had requested accommodated employment, respondent would have provided claimant with the appropriate accommodations. But claimant did not request any accommodation and voluntarily quit her employment with the respondent to move to the state of California. Respondent agrees with the ALJ's finding that claimant's pre-injury average weekly wage was \$725.33 and requests the Board to affirm that finding.

The two issues for Board review are claimant's pre-injury average weekly wage and nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

The Board agrees with the ALJ's conclusion that claimant is limited to a permanent partial general disability award based on her permanent functional impairment because claimant failed to make a good faith effort to return to her employment with respondent after she was released following her first surgery. In fact, claimant voluntarily quit her employment with respondent and moved to California before she was released to return to her regular work with respondent without restrictions on August 4, 1997. Thus, the

¹ See K.S.A. 1996 Supp.44-510e(a).

Board concludes that claimant's pre-injury average weekly should be imputed and claimant is, therefore, limited to an award based on her permanent functional impairment.²

With respect to claimant's permanent functional impairment, the Board finds Dr. Edward J. Prostic's 25 percent opinion is the most persuasive and accurate rating contained in the record. Dr. Prostic's 25 percent rating takes into consideration the additional impairment resulting from claimant's second surgery performed by Dr. Feldman on January 3, 2001. In contrast, Dr. Tenny's 10 percent opinion does not include Dr. Feldman's surgery as Dr. Tenny's 10 percent opinion was expressed based on claimant's condition as of July 3, 1997, after her May 1997 surgery. Thus, Dr. Tenny's 10 percent opinion does not take into consideration the additional impairment from claimant's second surgery. The Board, therefore, concludes that claimant is entitled to a 25 percent permanent partial general disability award instead of the 17.5 percent as found by the ALJ.

In regard to claimant's pre-injury average weekly wage, the Board finds that claimant proved through her testimony and Exhibit 1 admitted at the regular hearing that as of October 7, 1996, claimant was earning \$45,717 per year in total salary, benefits, and bonus. Thus, the Board concludes that claimant's pre-injury average weekly wage is \$879.17 instead of the \$725.33 per week found by the ALJ. In the litigation of a workers compensation case, the respondent is required to provide payroll records for the purpose of computing claimant's average weekly wage.³ Here, the respondent failed to provide such records. Claimant was asked if the wage information in Exhibit 1 was accurate as to what she was paid after October 7, 1996. Claimant replied, "Yes, it appears to be."⁴

The Board also adopts and incorporates into this order the findings and conclusions contained in the ALJ's Award that are not inconsistent with the Board's findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of Board that ALJ Julie A.N. Samples' February 8, 2002, Award, should be, and is hereby, modified as follows:

² See *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, Syl. ¶ 2, 977 P.2d 288, rev. denied 267 Kan. 889 (1999), *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, Syl. ¶ 2, 962 P.2d 1100, rev. denied 265 Kan. 885 (1998).

³ See K.A.R. 51-3-8.

⁴ Regular Hearing, October 25, 2001, p. 10.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Debbie Dreiling, and against the respondent, Rock Bottom Restaurants, and its insurance carrier, Fireman's Fund Insurance Company, for an accidental injury which occurred on April 30, 1997, and based upon an average weekly wage of \$879.17.

Claimant is entitled to 64.86 weeks of temporary total disability compensation at the rate of \$338 per week or \$21,922.68, followed by 91.29 weeks of permanent partial disability compensation at the rate of \$338 per week or \$30,856.02, for a 25 percent permanent partial general disability, making a total award of \$52,778.70, which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

All other orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terri Z. Austenfeld, Attorney for Claimant
Steven J. Quinn, Attorney for Respondent
Julie A.N. Sample, Administrative Law Judge
Director, Division of Workers Compensation